(1) NO. 88-333

IN THE SUPREME COURT OF THE UNITED STATES

Supreme Court
FILED
AUG 24
JOSEPH F. SPANIOL
CLERK

OCTOBER TERM, 1987

STATE OF ALABAMA,

RESPONDENT,

VS.

JAMES LEWIS SMITH,

PETITIONER.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

OF

DON SIEGELMAN
ALABAMA ATTORNEY GENERAL

ROSA HAMLETT DAVIS
ALABAMA ASSISTANT ATTORNEY GENERAL
CHIEF OF THE APPEAL DIVISION

P. DAVID BJURBERG
ALABAMA ASSISTANT ATTORNEY GENERAL

COUNSEL OF RECORD

ALABAMA STATE HOUSE
11 SOUTH UNION STREET
MONTGOMERY, ALABAMA 36130
(205) 261-7300

ATTORNEYS FOR RESPONDENT

QUESTIONS PRESENTED

I. Whether this Court should grant certiorari to resolve a split among the lower state and federal courts on the question of whether North Carolina v. Pearce, 395 U.S. 711 (1969) applies where a defendant's guilty plea is withdrawn and, after a trial, he receives a greater sentence than he would have under the withdrawn plea bargain?

II. Whether this Court should grant certiorari and overrule the opinion of the Alabama Supreme Court which misapplied federal constitutional law by presuming judicial vindictiveness merely because the Defendant received a greater sentence after trial than he would have had he pleaded guilty?

PARTIES

The caption contains the names of all parties to the proceedings in the courts below.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED----------	i
PARTIES----------	ii
TABLE OF CONTENTS----------	iii
TABLE OF CASES----------	v
OPINIONS BELOW----------	1
JURISDICTION----------	2
CONSTITUTIONAL PROVISIONS INVOLVED----------	2
STATEMENT OF THE CASE	
THE FACTS----------	3
PROCEEDINGS BELOW---------	4
REASONS FOR GRANTING THE WRIT----	6
I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A SPLIT AMONG THE LOWER STATE AND FEDERAL COURTS ON THE QUESTION OF WHETHER NORTH CAROLINA V. PEARCE, 395 U.S. 711 (1969) APPLIES WHERE A DEFENDANT'S GUILTY PLEA IS WITHDRAWN AND, AFTER A TRIAL, HE RECEIVES A GREATER SENTENCE THAN HE WOULD HAVE UNDER THE WITHDRAWN PLEA BARGAIN?----------	6

TABLE OF CONTENTS (CON'T)

PAGE

II. THIS COURT SHOULD GRANT CERTIORARI AND OVERRULE THE OPINION OF THE ALABAMA SUPREME COURT WHICH MISAPPLIED FEDERAL CONSTITUTIONAL LAW BY PRESUMING JUDICIAL VINDICTIVENESS MERELY BECAUSE THE DEFENDANT RECEIVED A GREATER SENTENCE AFTER TRIAL THAN HE WOULD HAVE HAD HE PLEADED GUILTY.---------- 12

CONCLUSION---------- 14

CERTIFICATE OF SERVICE---------- 15

TABLE OF CASES

PAGE

Blackledge v. Perry, 417 U.S. 21 (1974)---------- 13

Bordenkircher v. Hayes, 434 U.S. 357 (1978)---------- 7

Castleberry v. Texas, 704 F. 2d 21 (Tex. Cr. App. 1984)---------- 9

Ehl v. Estelle, 656 F. 2d 166 (5th Cir. Unit A 1981)---------- 10

Frank v. Blackburn, 646 F. 2d 873 (5th Cir. 1980)---------- 10

Frazier v. State, 467 So. 2d 447 (Fla. App. 3 Dist. 1985)---------- 10

Hitchcock v. Wainwright, 745 F. 2d 1332 (11th Cir. 1984)---------- 10

Lippert v. Blackburn, 740 F. 2d 457 (6th Cir. 1984)---------- 10

North Carolina v. Pearce, 395 U.S. 711 (1969)---------- 6

Palm v. State, 656 F. 2d 429 (Tex. Cr. App. 1981)---------- 9

People v. Miller, 477 N.Y. S. 2d 688 (N.Y. App. Div. 1984)---------- 10

TABLE OF CASES (CON'T)

	PAGE
State v. Bawdon, 386 N.W. 2d 484 (S.D. 1986)	10
State v. Sutton, 197 Conn. 485, 498 A. 2d 65 (Conn. 1985)	9
United States v. Gilliss, 645 F. 2d 1269 (3rd Cir. 1981)	9

OPINIONS BELOW

1. The opinion of the Supreme Court of Alabama reversing respondent's conviction is not yet reported, but is reproduced as Appendix A to this petition.[1]

---

[1]The appendix to this petition is separately bound pursuant to Rule 21.1(k).

JURISDICTION

The judgment of the Supreme Court of Alabama which is sought to be reviewed was rendered on June 24, 1988. This Court has jurisdiction under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution,

Amendment V (in pertinent part)

...; nor shall [any person] be deprived of live, liberty or property without due process of law;...

United States Constitution

Amendment XIV (in pertinent part)

...; nor shall any state deprive any person of life, liberty, or property, without due process of law;...

STATEMENT OF THE CASE

A. STATEMENT OF THE FACTS

The Defendant, James Lewis Smith, was charged with rape, sodomy, and burglary in the first degree. On January 6, 1986, the Defendant entered a plea agreement in which he agreed to plead guilty to burglary I and rape I in exchange for the State's dismissing the sodomy I charge. (S.R. 3-4) The trial court dismissed the sodomy I charge upon the State's motion and accepted the Defendant's plea, sentencing him to concurrent sentences of 30 years. (S.R. 20-28)

Subsequently, the Defendant moved to withdraw his guilty plea. The motion was denied by the trial court. The case was then appealed to the Alabama Court of Criminal Appeals, which held that the trial court erred in accepting the Defendant's plea since he was not apprised that he was to be sentenced under the Alabama recidivist statute.

Smith v. State, 494 So. 2d 182 (Ala. Cr. App. 1986).

After it was remanded, the case was assigned to the trial judge who accepted the Defendant's plea. The sodomy I charge was reinstated. (T.R. 426) On August 18, 1986, the Defendant was tried and convicted on all three charges.

On August 22, 1986, the Defendant appeared before the Court for sentencing. Because of the details of the offense the trial court learned at trial, the court, under its interpretation of North Carolina v. Pearce, 395 U.S. 711 (1969), enhanced the Defendant's sentence, sentencing him to concurrent life sentences for burglary I and sodomy I and 150 years for rape I. (TR. 401-403, Appendix B)

B. PROCEEDINGS BELOW

The Defendant was indicted by the Grand Jury of Montgomery County, Alabama for sodomy in the first degree, rape in the first degree, and burglary in the

first degree in violation of Code of Alabama (1975), §§13A-6-63, 13A-6-61 and 13A-7-5, respectively. (T.R. 416-422) The Defendant initially pled guilty to rape I and burglary I in exchange for the State's dismissing the sodomy I charge. (S.R. 3-4) He was then sentenced to concurrent sentences of 30 years. (S.R. 20-24) He appealed, and the Court of Criminal Appeals permitted the Defendant to withdraw his plea. The Defendant was then tried on all three charges and was sentenced to concurrent life sentences for burglary I and sodomy I and 150 years for rape I. (T.R. 401-403, Appendix B)

The Alabama Court of Criminal Appeals affirmed the Defendant's conviction and sentence with the exception of the 150 year sentence for rape I. Certiorari was granted by the Alabama Supreme Court solely upon the

appropriety of the trial court's enhancement of the burglary I sentence. The court held that the enhancement constituted judicial vindictiveness under its interpretation of North Carolina v. Pearce and remanded the case to the trial court for resentencing. (Appendix A)

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A SPLIT AMONG THE LOWER STATE AND FEDERAL COURTS ON THE QUESTION OF WHETHER NORTH CAROLINA V. PEARCE, 395 U.S. 711 (1969) APPLIES WHERE A DEFENDANT'S GUILTY PLEA IS WITHDRAWN AND AFTER A TRIAL, HE RECEIVES A GREATER SENTENCE THAN HE WOULD HAVE UNDER THE WITHDRAWN PLEA BARGAIN?

In North Carolina v. Pearce, 395 U.S. 711 (1969), a defendant's sentence was enhanced by the trial court following a successful appeal. This

Court held that such enhancement is unconstitutional since it penalizes convicted felons who elect to exercise their appellate remedies; due process requires that vindictiveness against a defendant who has successfully challenged his conviction must play no role in sentencing since the fear of vindictiveness would deter others from exercising their constitutional rights. A sentence can only be enhanced where events subsequent to the first trial have thrown new light upon the defendant's character. Id. at 723-725.

In Bordenkircher v. Hayes, 434 U.S. 357 (1978) this Court refused to broaden the scope of Pearce to include instances where a defendant has repudiated a plea bargain agreement. In Bordenkircher, the defendant and the prosecutor entered into plea negotiations wherein the prosecutor offered a five year sentence for a plea

but informed the defendant that if he insisted on a trial, he would be charged as a habitual offender. Despite the warning, the defendant insisted on trial, and he was charged and convicted as a habitual offender and sentenced to life imprisonment. This Court found Pearce to be distinguishable from these facts. In Pearce, the State unilaterally imposed a penalty upon a defendant who had chosen to exercise his right to appeal his original conviction which this Court found to be a situation "very different from the give-and-take negotiations common in plea bargaining between the prosecution and defense, which arguably possess relatively equal bargaining power." Id. at 362.

This Court has yet to address the analogous situation where the trial court has enhanced a defendant's sentence after a trial following the

defendant's repudiation of a plea bargain. However, other jurisdictions have faced this issue and have treated it dissimilarly.

In the instant case, the Alabama Supreme Court held that a trial court is precluded from enhancing a defendant's sentence except in the limited circumstances as prescribed by Pearce, irrespective that the defendant rejected the plea bargained sentence and insisted on trial. Some jurisdictions have treated this issue similarly. United States v. Gilliss, 645 F. 2d 1269 (3rd Cir. 1981); State v. Sutton, 197 Conn. 485, 498 A. 2d 65 (Conn. 1985); Castleberry v. Texas, 704 F. 2d 21 (Tex. Cr. App. 1984); Palm v. State, 656 F. 2d 429 (Tex. Cr. App. 1981).

However, other jurisdictions have excluded the principles of Pearce to the consequences of plea bargaining, holding

that a claim of judicial vindictiveness will not be heard when the sentence given by the trial court is harsher than the sentence offerred in the plea bargain but rejected by the defendant. Hitchcock v. Wainwright, 745 F. 2d 1332 (11th Cir. 1984); Lippert v. Blackburn, 740 F. 2d 457 (6th Cir. 1984); Ehl v. Estelle, 656 F. 2d 166 (5th Cir. Unit A 1981); Frank v. Blackburn, 646 F. 2d 873 (5th Cir. 1980); State v. Bawdon, 386 N.W. 2d 484 (S.D. 1986); Frazier v. State, 467 So. 2d 447 (Fla. App. 3 Dist. 1985); People v. Miller, 477 N.Y. S. 2d 688 (N.Y. App. Div. 1984). The logic behind these holdings is apparent. "If a defendant can successfully demand the same leniency after standing trial that was offered to him prior to trial in exchange for a guilty plea, all incentives to plea bargain disappear; the defendant has nothing to lose by

going to trial." Frank, 646 F. 2d at 883. All decisions to the contrary, including the case at bar, undermine the underlying philosopy and purpose of the plea bargaining system.

Because of the split among the lower courts and the effect these decisions have upon the plea bargaining system, this Court should grant certiorari to decide whether under the Fifth and Fourteenth Amendments a trial court may enhance a defendant's sentence following his repudiation of a plea bargain agreement.

II. THIS COURT SHOULD GRANT CERTIORARI AND OVERRULE THE OPINION OF THE ALABAMA SUPREME COURT WHICH MISAPPLIED FEDERAL CONSTITUTIONAL LAW BY PRESUMING JUDICIAL VINDICTIVENESS MERELY BECAUSE THE DEFENDANT RECEIVED A GREATER SENTENCE AFTER TRIAL THAN HE WOULD HAVE HAD HE PLEADED GUILTY.

If this Court finds that the Pearce analysis is applicable, the opinion of the Alabama Supreme Court is still in conflict with opinions of this Court and lower federal courts. The Alabama Supreme Court presumed judicial vindictiveness merely because the Defendant's burglary I sentence was enhanced; such a presumption is erroneous. Due process does not preclude a trial judge from enhancing a defendant's sentence upon retrial after appeal but only by those "that pose a realistic likelihood of

vindictiveness." Blackledge v. Perry, 417 U.S. 21 (1974). In the case at bar, this test is not met. Indeed, the trial court specifically stated that it was not enhancing the sentence vindictively but because it had learned from the details exposed at trial the real flavor of the offense. (T.R. 401-403, Appendix B) This reason has been found to be sufficient by a lower federal court. Frank, 646 F. 2d at 885.

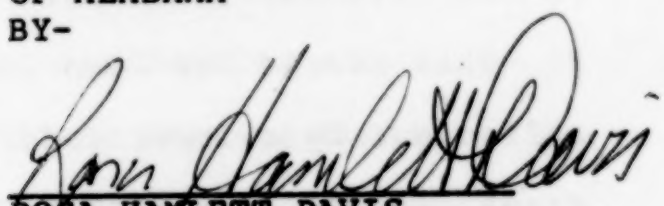
This Court should grant certiorari to correct the Alabama Supreme Court's misapplication of the Pearce analysis.

CONCLUSION

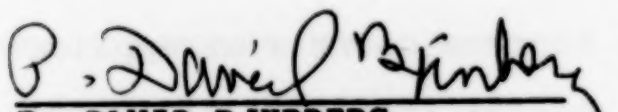
For the reasons stated, this Court should grant certiorari to decide the important federal questions presented in this case.

Respectfully submitted,

DON SIEGELMAN
ATTORNEY GENERAL
OF ALABAMA
BY-



ROSA HAMLETT DAVIS
ASSISTANT ATTORNEY GENERAL
OF ALABAMA



P. DAVID BJURBERG
ASSISTANT ATTORNEY GENERAL
OF ALABAMA

ADDRESS OF COUNSEL:

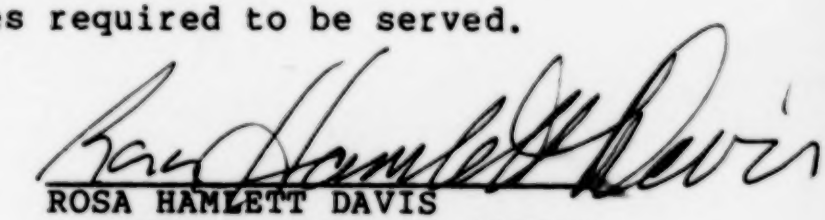
Alabama State House
11 South Union Street
Montgomery, Alabama 36130
205-261-7300

CERTIFICATE OF SERVICE

We, Rosa Hamlett Davis and P. David Bjurberg, the members of the Bar of the Supreme Court of the United States, do hereby certify that this 23rd day of August, 1988, we did serve a copy of this petition and a copy of the accompanying appendix on Respondent by placing the same in the United States Mail, first class postage prepaid, and properly addressed to counsel of record for Respondent as follows:

Hon. John C. Cason
Attorney at Law
503 South Court Street
Suite 320
Montgomery, Alabama 36104

We further certify we have served all parties required to be served.



ROSA HAMLETT DAVIS
ASSISTANT ATTORNEY GENERAL
OF ALABAMA

P. DAVID BJURBERG
ASSISTANT ATTORNEY GENERAL
OF ALABAMA